NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUN 20 2003

CATHY A. CATTERSON
U.S. COURT OF APPEALS

DAVID FRED FISHER,

Petitioner - Appellant,

v.

STEVEN J. CAMBRA, JR., Warden; ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Respondents - Appellees.

No. 01-17528

D.C. No. CV-98-00787-WBS

MEMORANDUM[*]

Appeal from the United States District Court
for the Eastern District of California
William B. Shubb, Chief District Judge, Presiding

Submitted June 11, 2003[**]
San Francisco, California

Before: HILL,[***] T.G. NELSON, and HAWKINS, Circuit Judges.

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[*] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[**] This panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a)(2).

[***] The Honorable James C. Hill, Senior United States Circuit Judge for the Eleventh Circuit, sitting by designation.

David Fred Fisher appeals from the district court's denial of his 28 U.S.C. § 2254 petition. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we affirm. Because the parties are familiar with the facts, we do not recite them here.

Wrongfully admitted evidence violates the Constitution's Due Process Clause and warrants habeas relief "only when the questioned evidence renders the trial so fundamentally unfair as to violate federal due process."[1] The Supreme Court has "defined the category of infractions that violate 'fundamental fairness' very narrowly."[2] The alleged error in petitioner's case, if it was constitutional error at all, does not fall within that narrow category. A comparison with Supreme Court precedent makes this clear.

In *Estelle v. McGuire*,[3] the prosecutor introduced more inflammatory evidence, and the court offered a far less effective limiting instruction than in this case.[4] Moreover, the inflammatory evidence was never directly linked to the

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[1] *Jeffries v. Blodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993).

[2] *Estelle v. McGuire*, 502 U.S. 62, 73 (1991).

[3] *Id.*

[4] *Id.* at 65 (describing evidence of prior rectal tearing and fractured ribs in baby), 71–75 (discussing problematic jury instruction).

defendant.[5] Nonetheless, the Supreme Court concluded that the evidence was relevant and found no due process violation from its introduction.[6]

In this case, the introduced evidence was directly linked to the defendant, was highly relevant, and was less inflammatory than the evidence in *Estelle*. Moreover, the trial court's limiting instruction to the jury guarded against the misuse of the evidence far more thoroughly than did the instruction in *Estelle*.

In light of the "clearly established Federal law, as determined by the Supreme Court of the United States"[7] represented by *Estelle*, with which the state court's decision comports, we cannot conclude that the district court erred on the first issue raised.[8]

Petitioner's second claim, for ineffective assistance of counsel, also fails. Petitioner asserts that his appellate counsel should have raised the above due process claim on his direct appeal. Because, as we have just concluded, that claim lacks merit, he can show no prejudice from counsel's failure to raise it.[9]

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[5] *Id.* at 69.

[6] *Id.* at 69, 71–75.

[7] 28 U.S.C. § 2254(d).

[8] *Id.*

[9] *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

AFFIRMED.